TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 454

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

M. J. BARROW.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED MAY 6, 1915.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 962.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

M. J. BARNOW.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the District Court of the United States for the Eastern District of Pennsylvania, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, or some of you, between the United States of America, plaintiff, and M. J. Barnow, defendant, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington within thirty days, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said

Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Edward D. White, Chief Justice of the Supreme Court of the United States, at Philadelphia, the tenth day of April, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] GEORGE BRODBECK,
Deputy Clerk of the District Court of the United States.

Allowed.

J. W. THOMPSON,
U. S. District Judge.

3 In the District Court of the United States for the Eastern District of Pennsylvania.

December sessions, 1914.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

The Grand Inquest of the United States of America, inquiring in and for the eastern district of Pennsylvania, upon their respective oaths and affirmations do present that heretofore, to wit, on December 4, 1914, one M. J. Barnow (the Christian name of the said M. J. Barnow being to this Grand Inquest unknown), late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, to wit, at Reading, in the State of Pennsylvania, did knowingly, wilfully and unlawfully, with intent to defraud a certain person, to wit, one John L. Ennis, falsely pretend to be an employe of the United States acting under the authority of the said United States, to wit, an agent employed by the Government to sell a certain set of books entitled "Messages and Papers of Presidents," and did then and there take upon himself to act as such agent, in this, that he then and there visited the said John L. Ennis and falsely pretended to the said John L. Ennis that he was such an employe of the United States employed as aforesaid and for the purpose aforesaid, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

And the Grand Inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, on December 4, 1914, the said M. J. Barnow, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, to wit, at Reading, in the State of Pennsylvania, aforesaid, did knowingly, wilfully, and unlawfully, with intent to defraud a certain person, to wit, the aforesaid John L. Ennis, falsely pretend to be an employe of the United States, acting under the authority of the United States, to wit, an agent employed by the Government to sell a certain set of books entitled "Messages and Papers of the Presidents," then and there

published by the Government. And the said M. J. Barnow did then and there, in such pretended character, knowingly, wilfully, and feloniously obtain from the said John L. Ennis a large sum of money, to wit, $10.00, which the said Ennis would not have given him, the said M. J. Barnow, unless he, the said Ennis, had supposed the said M. J. Barnow to be such an employe, as aforesaid, and unless he had supposed that the said sum of money was to be paid over to the Government as a payment on account of the subscription price of the said set of books, which were to be furnished, as the said Barnow then and there represented, to the said Ennis for the sum of $59.50, which sum, as the said M. J. Barnow further stated, repsented only the cost of binding the said set of books. It was not true that the said set of books was being published by the Government, or that the sum of $59.50 (which included the $10.00 so paid on account) represented only the cost of binding the said books, but the said books were in fact being published by the "Army and Navy Magazine," and were being bound at a cost much less than $59.50, as he, the said M. J. Barnow, then and there well knew; and the said M. J. Barnow, then and there, by means of representing himself as an employe of the Government as aforesaid, intended to defraud the said John L. Ennis of the said sum of $10.00, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

5 3. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present that heretofore, to wit, on December 3, 1914, the said M. J. Barnow, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, to wit, at Reading, in the State of Pennsylvania, did knowingly, wilfully, and unlawfully, with intent to defraud a certain person, to wit, one Thomas J. Fessler, falsely pretend to be an employe of the United States, acting under the authority of the said United States, to wit, an agent employed by the Government to sell a certain set of books entitled "Messages and Papers of Presidents," and did then and there take upon himself to act as such agent, in this, that he then and there visited the said Thomas J. Fessler and falsely pretended to the said Thomas J. Fessler that he was such an employe of the United States, employed as aforesaid and for the purpose aforesaid, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

6 4. And the ground inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present that heretofore, to wit, on December 3, 1914, the said M. J. Barnow, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, to wit, at Reading in the State of Pennsylvania aforesaid, did knowingly, wilfully, and unlawfully, with intent to defraud a certain person, to wit, the aforesaid Thomas J. Fessler, falsely pretend to be an employe of the

United States, acting under the authority of the United States, to wit, an agent employed by the Government to sell a certain set of books entitled "Messages and Papers of the Presidents," then and there published by the Government. And the said M. J. Barnow did then and there, in such pretended character, knowingly, wilfully, and feloniously obtain from the said Thomas J. Fessler a large sum of money, to wit, $11.50, which the said Fessler would not have given him, the said M. J. Barnow, unless he, the said Fessler, had supposed the said M. J. Barnow to be such an employe, as aforesaid, and unless he had supposed that the said sum of money was to be paid over to the Government as a payment on account of the subscription price of the said set of books, which were to be furnished, as the said Barnow then and there represented, to the said Fessler for the sum of $59.50, which sum, as the said M. J. Barnow further stated, represented only the cost of binding the said set of books. It was not true that the said set of books was being published by the Government or that the sum of $59.50 (which included the $11.50 so paid on account) represented only the cost of binding the said books, but the said books were in fact being published by the "Army and Navy Magazine," and were being bound at a cost much less than $59.50, as he, the said M. J. Barnow, then and there well knew; and the said M. J. Barnow then and there, by means of representing himself as an employe of the Government as aforesaid, intended to defraud the said Thomas J. Fessler of the said sum of $11.50, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

7 5. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present that heretofore, to wit, on December 5, 1914, the said M. J. Barnow, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, to wit, at Reading, in the State of Pennsylvania, did knowingly, wilfully, and unlawfully, with intent to defraud a certain person, to wit, one Paul W. Wertz, falsely pretend to be an employe of the United States acting under the authority of the said United States, to wit, an agent employed by the Government to sell a certain set of books entitled "Messages and Papers of Presidents," and did then and there take upon himself to act as such agent, in this, that he then and there visited the said Paul W. Wertz, and falsely pretended to the said Paul W. Wertz that he was such an employee of the United States, employed as aforesaid and for the purpose aforesaid, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

8 6. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present that heretofore, to wit, on December 5, 1914, the said M. J. Barnow, late of the district aforesaid, at the district aforesaid,

and within the jurisdiction of this court, to wit, at Reading, in the State of Pennsylvania aforesaid, did knowingly, wilfully, and unlawfully, with intent to defraud a certain person, to wit: The aforesaid Paul W. Wertz, falsely pretend to be an employe of the United States, acting under the authority of the United States, to wit, an agent employed by the Government to sell a certain set of books entitled "Messages and Papers of the Presidents," then and there published by the Government. And the said M. J. Barnow did then and there in such pretended character, knowingly, wilfully, and feloniously obtain from the said Paul W. Wertz a large sum of money, to wit, $14.50, which the said Wertz would not have given him, the said M. J. Barnow, unless he, the said Wertz, had supposed the said M. J. Barnow to be such an employe, as aforesaid, and unless he had supposed that the said sum of money was to be paid over to the Government as a payment on account of the subscription price of the said set of books, which were to be furnished, as the said Barnow then and there represented, to the said Wertz for the sum of $59.50, which sum, as the said M. J. Barnow further stated represented only the cost of binding the said set of books. It was not true that the said set of books was being published by the Government, or that the sum of $59.50 (which included the $14.50 so paid on account) represented only the cost of binding the said books, but the said
9 books were in fact being published by the "Army and Navy Magazine," and were being bound at a cost much less than $59.50, as he, the said M. J. Barnow, then and there well knew, and the said M. J. Barnow then and there, by means of representing himself as an employee of the Government as aforesaid, intended to defraud the said Paul W. Wertz of the said sum of $14.50, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

FRANCIS FISHER KANE,
United States Attorney.

PHILADELPHIA, PA.,
14 December, 1914.

11 (Endorsed:) Com. return No. 1 of 1915. No. 56, December sessions, 1914. District Court United States, Eastern District of Pennsylvania. The United States of America *v.* M. J. Barnow. A true bill. Miers Busch, foreman. Indictment: Falsely pretending to be an officer of the United States, etc. Filed Jan. 7, 1915. Wm. W. Craig, clerk, by L., deputy clerk. Witnesses: John L. Ennis, Thomas J. Fessler, Paul W. Wertz, Fred Ganter, C. R. Nixon. Sec. 32, act Mch. 4, 1909; 35 Stat., Part 1, 1088.

12 In the District Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA *v.* M. J. BARNOW.	No. 56, December Term, 1914. Demurrer to Indictment.

(Filed March 8, 1915.)

And now comes the said M. J. Barnow, the defendant in the above-entitled cause and demurs to the indictment for the following reasons:

1. Because the same is bad in substance.
2. Because the same fails to set forth facts sufficient to constitute an offense against the United States.

The said M. J. Barnow demurs to the first count of the indictment for the following reasons:

1. Because the same is bad in substance.
2. Because the same fails to set forth facts sufficient to constitute an offense against the United States.

The said M. J. Barnow demurs to the second count of the indictment for the following reasons:

1. Because the same is bad in substance.
2. Because the same fails to set forth facts sufficient to constitute an offense against the United States.

The said M. J. Barnow demurs to the third count of the indictment for the following reasons:

1. Because the same is bad in substance.
2. Because the same fails to set forth facts sufficient to constitute an offense against the United States.

The said M. J. Barnow demurs to the fourth count of the indictment for the following reasons:

1. Because the same is bad in substance.
2. Because the same fails to set forth facts sufficient to constitute an offense against the United States.

The said M. J. Barnow demurs to the fifth count of the indictment for the following reasons:

13 1. Because the same is bad in substance.
2. Because the same fails to set forth facts sufficient to constitute an offense against the United States.

The said M. J. Barnow demurs to the sixth count of the indictment for the following reasons:

1. Because the same is bad in substance.
2. Because the same fails to set forth facts sufficient to constitute an offense against the United States.

HENRY D. GREEN,
DANIEL THEW WRIGHT,
Attorneys for Defendant.

14 In the District Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
v.
M. J. BARNOW.
December session, 1914. No. 56.

Upon demurrer to indictment.

(Filed 12, March, 1915.)

THOMPSON, J.

The indictment contains six counts under section 32 of the Criminal Code of March 4, 1909 (35 Stat., 1088). At least two separate and distinct offences are prohibited under the statute:

(1) With intend to defraud any person, falsely assuming or pretending to be an officer or employe acting under the authority of the United States and taking upon himself to act as such.

(2) With intent to defraud any person, falsely assuming or pretending to be an officer or employe acting under the authority of the United States and in such pretended character demanding or obtaining from any person any money or other valuable thing.

U. S. *v.* Taylor, 108 Fed., 621.

U. S. *v.* Farnham, 127 Fed., 478.

15 The odd-numbered counts, 1, 3, and 5, are based upon the first and the even-numbered counts, 2, 4 and 6, are based upon the second of the above-named offences. Beginning with the first and second, each pair of counts charge the respective offences on different dates and with intent to defraud different persons. The odd-numbered counts charge that the defendant, with intent to defraud a certain person named, did falsely pretend to be an employe of the United States acting under the authority of the United States, to wit, an agent employed by the Government to sell a certain set of books entitled "Messages and Papers of Presidents," and did then and there take upon himself to act as such agent, in this, that he then and there visited the person named and falsely pretended to him that he was such an employe of the United States employed as aforesaid for the purpose aforesaid, contrary, etc.

It was admitted by the district attorney at the argument that there was not in existence such an employe or such an employment as that of an agent employed by the Government to sell the books in question, and it is contended by counsel for the defendant that the indictment does not, therefore, come within the intent of the act nor within the limitations of the legislative powers of Congress. I think the question raised by the demurrer can be determined upon the language and intent of the act as construed by the courts without passing upon the question as to whether it is within the constitutional power of Congress to prohibit the acts described in the indictment.

The gist of the offence is the false impersonation of an officer or employe of the United States. The false impersonation of another was made punishable at common law, and Congress undoubtedly has the power to punish the false impersonation of an officer or employe of the United States.

16 Littell *v.* United States, 169 Fed., 620.

False personation is the offense of falsely representing some other person and acting in the character thus unlawfully assumed in order to deceive others and thereby gain some profit or advantage. And, under the construction of the act adopted in the Littell case and in the Taylor case, supra, the offense includes holding one's self out as such officer or employe for the purpose, among other things, of giving him such a credit or standing as will enable him to successfully demand or otherwise obtain money or other valuable thing from another for his own private use and benefit, with the intent to defraud. It may well be that, in addition to prohibiting the personation of a Government officer or employe and thereby obtaining credit and standing for the purpose of imposing upon individuals, Congress might prohibit any person, with intent to defraud, from falsely representing that he is in the employ of the United States. To constitute the offense of false personation, however, there must be personation of some particular person or class of persons, and there cannot be a false personation of a supposititious individual who has never existed or whose class has never existed.

See 19th Cyc., page 380, and cases there cited.

That Congress did not intend to broaden the scope of the act by extending it beyond the false personation of its officers or employes is apparent from an examination of its language. If the acts charged in the indictment were intended to be included, Congress could have used apt language to make it an offense to falsely assume or pretend to be employed in some pretended capacity and to pretend to be acting under pretended authority of the United States. As the offense is expressed in the act it is directed against the false assumption or pretense to be one who is actually an officer or

17 employe acting under the authority of the United States, and I think this is borne out by the following language, "and shall take upon himself to act as such or shall in such pretended character demand or obtain, etc." It is apparent, therefore, that Congress intended to punish false impersonation of its officers or employes and did not intend to include within Federal offences any mean and petty artifice used by salesmen consisting merely of a false representation as to some supposititious employment by the Government.

The same reasoning applies to the charge in the even-numbered counts.

Before finally disposing of the case, reference may be made to the charge of fraud in the even-numbered counts. These counts were

drawn having in view the case of United States v. Rush, 196 Fed., 579. I entirely agree with the conclusion of Judge Rudkin in that case and am of the opinion that the pleader has not met by the additional averments the objection to the allegations there under consideration. There is no allegation in the indictment to sustain a charge that the person alleged to be defrauded was deprived of any right, interest, or property, or that he was cheated or overreached. The mere fact that the purchasers would not have given the defendant their money on account of the books unless they had supposed it was to be paid over to the Government on account of the subscription price of the books to be furnished, or that it was falsely stated that the entire price represented only the cost of binding the books, is not sufficient to sustain an allegation of fraud. At most it was a mere false representation which did not amount to fraud.

The demurrer to the indictment is sustained.

18 United States District Court, Eastern District, Pennsylvania.

UNITED STATES OF AMERICA *v.* M. J. BARNOW.	December sessions, No. 56.

Judgment entry.

(Filed April 7, 1915.)

This cause coming on for hearing upon the demurrer to the indictment, and to the respective counts thereof, and the court being fully advised in the premises, upon consideration thereof, sustains the same. Wherefore it is considered and adjudged that the said M. J. Barnow go hence without day, and that he be, and he hereby is, discharged from the said indictment and the premises, unless a writ of error be taken within thirty days from the entry of this judgment in accordance with the provisions of the act of Congress approved March 2, 1907 (34 Stat., 1246), in which event M. J. Barnow, the defendant, shall be admitted to bail on his own recognizance, pending the prosecution and determination of the writ of error.

The bond herein heretofore given by the said M. J. Barnow is discharged, and the American Surety Company is hereby discharged from liability as surety thereon.

J. W. THOMPSON, J.

19 In the District Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, v. M. J. BARNOW, DEFENDANT IN ERROR.	December ession, 1914. No. 56.

Petition for writ of error.

(Filed April 7, 1915.)

And now, to wit, April 7, 1915, comes the United States of America, plaintiff herein, by Francis Fisher Kane, United States attorney for the Eastern District of Pennsylvania, and says:

That on or about the 12th day of March, 1915, the District Court of the United States, for the Eastern District of Pennsylvania, filed a decision sustaining a demurrer to an indictment, against this plaintiff and in favor of the defendant, and on April 7, 1915, entered judgment in accordance with the said decision, in which decision and judgment and proceedings had prior thereto in this cause, certain errors were committed in the construction of the provisions of a statute upon which the indictment was founded, to wit: The act of Congress approved March 4, 1909, c. 321, section 32 (35 Stat., 1088), to the prejudice of this plaintiff, all of which will more in detail appear for the assignment of errors which is filed with this petition.

20 Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States, in accordance with the provisions of the act of Congress approved March 2, 1907 (34 Stat., 1246).

FRANCIS FISHER KANE,
United States Attorney.

UNITED STATES OF AMERICA,
Eastern district of Pennsylvania, ss:

Francis Fisher Kane, being duly sworn according to law, deposes and says that he is attorney for the United States of America, plaintiff in error in the foregoing case and petition, that the statements contained in the petition are true, and that the writ of error therein prayed for is taken out because he feels that an injustice has been done by reason of said decision and judgment.

FRANCIS FISHER KANE.

Sworn and subscribed before me this 7th day of April, A. D. 1915.

LEO A. LILLY,
Dep. Clerk U. S. District Court E. D. of Pa.

21 In the District Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, PLAINTIFF,
v.
M. J. BARNOW, DEFENDANT.
December sessions, 1914.
No. 56.

Assignment of errors.

(Filed April 7, 1915.)

The plaintiff in this action, in connection with its petition for writ of error, makes the following assignment of errors, which it avers occurred in the decision of the cause, to wit:

The learned court erred:

1. In sustaining the demurrer;

2. In so construing section 32 of the act of March 4, 1909, c. 321 (35 Stat., 1088), as to make it not broad enough to include the averments of the indictment;

3. In so construing section 32 of the act of March 4, 1909, c. 321 (35 Stat., 1088), as to make it not broad enough to include the averments of the indictment, together with the admission made by the United States attorney at the argument upon the demurrer that there was not in existence such an employe or such as an employment as that of an agent employed by the Government to sell the set of books mentioned in the indictment;

4. In not deciding that section 32 of the act of March 4, 1909, c. 321 (35 Stat., 1088), was broad enough to cover the case of a
22 defendant who, with intent to defraud, pretends to be an employe acting under the authority of the United States, and takes upon himself to act as such, or in such pretended character demands and obtains money from any person, there having been no such employe or employment in existence at the time;

5. In deciding that "the gist of the offense" under section 32 of the act of March 4, 1909, c. 321 (35 Stat., 1088), "is the false impersonation of an officer or employe of the United States";

6. In deciding that as the offense defined in section 32 of the act of March 4, 1909, c. 321 (35 Stat., 1088), "is expressed in the act, it is directed against the false assumption or pretense to be one who is actually an officer or employe acting under the authority of the United States";

7. In deciding that "it is apparent, therefore, that Congress intended," in section 32 of the act of March 4, 1909, c. 321 (35 Stat., 1088) "to punish false impersonation of" * * * "officers or employes, and did not intend to include within Federal offenses any mean and petty artifice used by salesmen, consisting merely of a false representation as to some supposititious employment by the Government";

8. In not including within the terms of section 32 of the act of March 4, 1909, c. 321 (35 Stat., 1088), the offense of pretending to be an officer or employe of the United States in cases where the existence of the office or employment is pretended and exists only in the imagination of the defendant;

9. In not distinguishing the offense of impersonating an existing officer or employe from the offense of pretending to be an officer or employe having no actual existence at the time.

FRANCIS FISHER KANE,
United States Attorney.

23 In the District Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, PLAINTIFF, v. M. J. BARNOW, DEFENDANT.	December sessions, 1914. No. 56.

Order.

(Filed April 7, 1915.)

And now, this 7th day of April, 1915, comes the United States of America, plaintiff herein, by its attorney, Francis Fisher Kane, and files herein and presents to the court its petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by it, praying also that a transcript of the record, proceedings, and papers upon which the decision herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error.

J. W. THOMPSON, J.

24 UNITED STATES OF AMERICA, *ss:*

The President of the United States to M. J. Barnow, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, D. C., within thirty days, pursuant to a writ of error filed in the clerk's office of the District Court of the United States, Eastern District of Pennsylvania, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. Whitaker Thompson, judge of the District Court of the United States, this 10th day of April, in the year of our Lord one thousand nine hundred and fifteen.

J. WHITAKER THOMPSON,
United States District Judge, Eastern District of Penna.

Service accepted.

DAN THEW WRIGHT,
Attorney for Defendant in Error.

25 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of pleas and proceedings in the case of United States of America v. M. J. Barnow, No. 56, December session, 1914, now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this twenty-fourth day of April, in the year of our Lord one thousand nine hundred and fifteen, and in the one hundred and thirty-ninth year of the independence of the United States.

[SEAL.]

WILLIAM W. CRAIG,
Clerk, District Court, U. S.
By GEORGE BRODBECK,
Deputy Clerk.

(Endorsed:) U. S. District Court, Eastern District of Penna. Office of the clerk. Received May 6, 1915. Supreme Court, U. S. Certified copy.

(Endorsement on cover:) File No. 24706. E. Pennsylvania, D. C. U. S. Term No. 962. The United States, plaintiff in error, v. M. J. Barnow. Filed May 6th, 1915. File No. 24706.

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CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
M. J. BARNOW. } No. 454.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case comes here upon writ of error sued out under the Criminal Appeals Act, 34 Stat. 1246. The opinion of the District Court (R. 7) is reported in 221 Fed. 140.

The defendant in error, M. J. Barnow, was indicted for violation of section 32 of the Criminal Code of March 4, 1909, 35 Stat. 1088, 1095, which provides:

> Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any Department, or any officer of the Government thereof, and shall take upon himself to act as such, or shall in such pretended char-

> acter demand or obtain from any person or from the United States, or any Department, or any officer of the Government thereof, any money, paper, document, or other valuable thing, shall be fined not more than one thousand dollars, or imprisoned not more than three years, or both.

The indictment charged in the first count that the defendant falsely pretended to be an employee of the United States, to wit, an agent employed by the Government to sell a certain set of books entitled "Messages and Papers of Presidents," and did take upon himself to act as such agent, in that he visited and falsely pretended to John L. Ennis that he was such an employee of the United States, employed as aforesaid, and for the purpose aforesaid (R. 2).

The second count charged that the defendant falsely made the same pretenses as to United States employment and authority alleged in the first count, and further falsely stated that the books were published by the Government; that the sum of $59.50, the price of the books, represented only the cost of the binding; that the defendant in his pretended character obtained $10 from Ennis, which Ennis would not have given unless he had supposed that the defendant were an employee of the Government, and that the $10 would be paid over to the Government on account of the subscription price of the books (R. 3).

The third and fifth counts differ from the first, and the fourth and sixth counts differ from the

second, only as to the names of the alleged victims and the dates on which the alleged pretenses were made.

In all the counts it was charged that the acts were done "with intent to defraud" the individuals named.

Defendant demurred to the indictment on the ground that it failed to set forth facts sufficient to constitute an offense against the United States (R. 6). It was and is admitted that there was not in existence any employee or employment such as it was alleged defendant pretended.

The demurrer was sustained on two grounds. The court held:

(*a*) That under a proper construction of the statute there is no offense unless a particular Governmental employee who is actually in existence, or of a class of employees actually in existence, is falsely personated (R. 7, 8). The court said (R. 8):

> The gist of the offense is the false impersonation of an officer or employe of the United States. * * *
>
> As the offense is expressed in the act it is directed against the false assumption or pretense to be one who is actually an officer or employe acting under the authority of the United States.

(*b*) That the statute is not violated unless the intended victim "is cheated or defrauded to his or her injury." This is the essence of the opinion in *United States* v. *Rush*, 196 Fed. 579, made the basis

of the second part of the decision. The court said of the allegations of the indictment that "at most it was a mere false representation which did not amount to fraud" (R. 9).

SPECIFICATIONS OF ERROR.

Errors are assigned that the court below erred in sustaining the demurrer and in wrongly construing the statute on which the indictment is based. Two general questions are raised:

1. Is it illegal under section 32 of the Criminal Code falsely to pretend to be an employee acting under the authority of the United States when there is no United States employee in existence of the character pretended?

2. Is the statute violated if the person whom the defendant intended to defraud is not actually defrauded and suffers no pecuniary injury?

ARGUMENT.

I.

Under section 32 of the Criminal Code, falsely to pretend to be an employee acting under authority of the United States and acting as such pretended employee is punishable, even though there be in existence no employee or class of employees of the character pretended.

1. The construction, not the constitutionality of the act, is involved.

Congress has constitutional power to prohibit any act which interferes with the due performance of

the functions of the Federal Government. The United States can act only through officers or employees. Congress may protect the duly authorized agents of the United States in the performance of their functions against violence. *In re Neagle*, 135 U. S. 1; *Tennesssee* v. *Davis*, 100 U. S. 257, 262; *Ex parte Yarbrough*, 110 U. S. 651, 658. It may equally prohibit acts which interfere with the performance of the duties of Federal agents by fraud or other means.

False assumption of authority as Federal agents with intent to defraud, and acts with reference to the falsely assumed authority, tend to interfere with the performance of their duties by duly appointed officers and employees. A certain guaranty of fair dealing and honesty accompanies one clothed with Federal authority. Correspondingly, the smooth administration of governmental affairs requires a certain respect for and submission to the authority with which Federal officers or employees may be invested. False assumption or pretense of such authority by impostors tends to degrade that authority which is duly constituted. It impairs, obstructs, and defeats the lawful functions of the Government, and amounts to a fraud upon the United States. *Haas* v. *Henkel*, 216 U. S. 462, 479, 480. Congress, having power to clothe certain persons with governmental authority as United States officials and employees, may prohibit all other persons from falsely assuming or pretending to have it.

The question in this case, therefore, is merely one of construction. How far did Congress go in the statute? The trial court, conceding the power of Congress to prohibit all usurpation of Federal authority, held that Congress had not done so in this instance, but had only prohibited the false impersonation of existing employees.

2. The gravamen of the offense is not the personation of a certain individual, or one of a class of individuals, but the wrongful pretense of Federal authority.

The language of the statute is broad: "Whoever shall falsely assume or pretend to be an officer or employee acting under the authority of the United States." There is here no limitation as to the kind of employment assumed or pretended. Every assumption or pretense to be an employee with Federal authority is included. According to the construction of the trial court the statute is "whoever shall falsely pretend to be an officer or employee *actually in existence.*" The court thus reads into the statute words which are not there. Of course, to constitute the offense the defendant must not only pretend that he is an employee of the United States, but also he must "take upon himself to act as such"; that is, to act as the employe which he pretends himself to be; or, in addition to pretending, he must "in such pretended character"—be that whatever he has chosen—demand or obtain some article of value.

The gist of the offense is the wrongful pretense of Federal authority. Section 32 is the sixth section in

the chapter of the Criminal Code entitled, "Offenses against the Operations of the Government." While the statute undoubtedly tends to protect the citizen against attempted fraud, it has a broader purpose. Against simple fraud the State statutes amply provide. But the wrongful usurpation of Federal authority and the consequent degradation of the Federal public service in the general estimation is the same whether there is or is not in existence an employee or class of employees of the kind to which defendant pretends.

If the statute is limited by the additional requirement that the officer be actually in existence, it is largely deprived of its force. The man clever enough to add to his credit by falsely pretending Government office will be careful to select an office which is not at the time *in esse*. Curious results would follow from such a limitation. For instance, an impostor pretending he is X, Assistant Attorney General, an actual incumbent in office, who obtains money as compromise of suit, violates the law; but if he similarly obtains the money by similar fictitious compromise, pretending he is the Assistant Solicitor General, there being none of that title, he violates no Federal statute.

3. The distinction between false personation of an individual and false pretense of official authority appears in many statutes and decisions.

Consideration of similar statutes bears out the construction contended for. Their history records

a continual extension of the kinds of deceits prohibited. At common law cheats were indictable when accomplished by use of tokens calculated to deceive the public. The statute of 33 Hen. VIII, c. 1, punished fraud effected by use of false privy tokens or counterfeit letters. The statute of 30 Geo. II, c. 24, was more general, providing against "all persons who knowingly by false pretenses shall obtain from any person money, goods, etc., with intent to cheat or defraud." See *Young* v. *King*, 3 Term Reports, 98. In the various criminal laws of the States usually one section prohibits false pretenses as in the English statutes, another section false personation of another under limited circumstances (*Queen* v. *Hague*, 4 B. & S. 715; *Whiteley* v. *Chappell*, 11 Cox C. C. 307), and still another provides punishment for anyone who falsely assumes or pretends to be one of a limited class of officers, such as a sheriff, deputy sheriff, justice of the peace, and constable, and who takes upon himself to act as such. Thus, Massachusetts Revised Laws, 1836, p. 725, sec. 31, prohibits false personation; sec. 32, false pretenses; p. 735, sec. 19, falsely assuming or pretending to be a justice of the peace, sheriff, deputy sheriff, coroner, or constable. See New York Criminal Code, sec. 928 (Birdseye's Consol. Laws N. Y. p. 3905), sec. 931 (*supra*, p. 3906), sec. 932 (*supra*, p. 3906); Page and Adams Anno. Ohio Code, secs. 12859, 12860, 13104; Illinois Criminal Code, secs. 96, 102, 103, 104; Illinois Stat. Anno. Jones & Addington, pp. 2039, 2040; Howell's Mich. Stat. 2d ed., secs.

14623, 14624, 14735; Tennessee Code, Shannon, 1896, secs. 6570, 6568, 6730. It seems clear that each crime, false pretenses, false personation, and false assumption or pretense of public authority, is separate and distinct from the other. To personate another means to pretend to be a particular person. *Queen* v. *Hague*, 4 B. & S. 719; *People* v. *Maurin*, 77 Cal. 436; *People* v. *Knox*, 119 Cal. 73, 51 Pac. 19. In the *Knox* case the indictment was for violation of the Penal Code, which provided "every person who falsely personates another and in such assumed character either becomes bail or surety for any party," etc., in that defendant impersonated "another, to wit, an officer of the law and a constable." The court in distinguishing the statutes prohibiting false personation of another from one prohibiting false assumption or pretense of official character said:

> * * * It [the statute] does not refer to a case where a party falsely assumes an official character. (119 Cal. 73, 74.)

Section 32 of the Criminal Code goes beyond a statute prohibiting false personation, and beyond a statute prohibiting falsely pretending to be a particular officer such as a sheriff. It includes the pretense to be anyone, officer or employee, acting under the authority of the United States or of any department or officer thereof. It is not limited to employees in existence when the act was passed. It is not limited to any particular employees or class of employees at any future time. There is no basis for the limitation suggested in the opinion of the lower

court that the employee whose character is pretended must be one of a class actually in existence. If the statute is a personation statute, a particular employee must be actually in existence to be personated. There is no middle ground. Thus there is no personation, but only pretense, if the class of employees is in existence but not the particular employee whose character is assumed. Indeed, the remarks of the court are simply by way of emphasis that here no particular employee was personated.

In previous cases under the statute the act is broadly construed, contrary to the decision below. In *United States* v. *Curtain*, 43 Fed. 433, conviction was had under the act of April 18, 1884, sec. 5448 R. S., now sec. 32 of the Criminal Code, where the charge was that defendant assumed to be a post office inspector. In *United States* v. *Ballard*, 118 Fed. 757, defendant was convicted of obtaining credit for board and lodging upon false representation that he was a United States deputy marshal. In *Littell* v. *United States*, 169 Fed. 620, a conviction was sustained where defendant falsely represented that he was a secret service agent and procured a Mrs. D. to lend him money on the faith thereof. In these cases it was not even suggested that the defendant could have escaped by showing that there was no post office inspector by the name of Curtain, no United States deputy marshal by the name of Ballard, or that there was no United States deputy marshal at all in that district, or that there was no secret service agent by

the name of Littell. The act was violated although there was no particular person or officer *in esse* whom the defendant in each case falsely personated or counterfeited. In the *Ballard* case the court said (118 Fed. 759):

> * * * It is true that criminal statutes are to be strictly construed in favor of personal liberty. But there is another rule equally as well established, and quite as wholesome, that, in construing remedial and protective statutes of this character, such construction should be given to them by the courts as is reasonably necessary to carry out and effectuate the legislative intent. It was doubtless well known to Congress, as it is especially well known to the judges administering the criminal statutes of the United States, that the personating of United States officers, or *the representing by irresponsible parties that they are in the employ of certain departments of the Government*, going through the country practicing the grossest frauds and impositions upon unsuspecting and unwary people, and under color of such false representations and pretensions obtaining money, credit, personal benefits, and assistance had become so frequent as to constitute an intolerable abuse. It was to correct this abuse and to protect the community from these peripatetic and prowling imposters that this statute was enacted.

In *United States* v. *Brown*, 119 Fed. 482, the indictment, under section 5448 R. S., charged that

defendants "did falsely assume and pretend to be officers and employes acting under authority of the United States, to wit, revenue officers and employes, and in such pretended character did fraudulently demand," etc. A demurrer on the ground that the indictment was defective in not particularizing the kind of revenue officer was overruled.

Similar State statutes are likewise so construed in the State cases. In *Commonwealth* v. *Connolly*, 97 Mass. 591, the indictment charged that defendant "did falsely assume and pretend to be * * * a deputy of the constable of the Commonwealth" "and did unlawfully take upon himself to act as such officer, by declaring," etc. The proof was that the defendant said he was "a State constable." Conviction was affirmed. In *Lansing* v. *People*, 57 Ill. 241, the defendant was convicted where he falsely said, in demanding money from a woman, "I am a police officer." In *Brown* v. *State*, —Tex. Crim. App. —170 S. W. 714, against an objection that the words "impersonation of an officer" were not defined in the court's charge, a charge was held sufficient which declared the defendant guilty if he falsely assumed and pretended to be "a deputy sheriff."

In the *Connolly*, *Lansing*, and *Brown* cases there was no false personation of a particular State officer *in esse*. The gist of the offense in each case was plainly indicated to be the false pretense of official authority. Since whether or not the official who the

defendant pretended himself to be was *in esse* was immaterial, no inquiry of the sort was made.

4. The legislative history of the act reenforces this view.

The history of section 32 of the Criminal Code also tends to demonstrate that its broad construction is in accordance with the legislative intent. Originally section 32 was the act of April 18, 1884, 23 Stat. 11, c. 26. A bill had been presented in the 47th Congress covering abuses in the administration of the pension law. See *Pearce* v. *State*, 115 Ala. 115. The situation before Congress at the time is presented in the remarks of Mr. Garland of the Committee on the Judiciary (Cong. Rec., v. 14, pt. 4, p. 3263, 47th Cong., 2d session):

> Mr. President, section 5435 of the Revised Statutes makes provision against persons falsely representing themselves to be entitled to certain annuities, dividends, pensions, prize-money, etc., from the Government, and section 5448 makes provision for punishing persons who falsely represent themselves as revenue officers. There the statutes stop. This bill provides for punishing persons who represent themselves as officers or employes or agents of the United States in any respect whatever.

Mr. Blair said:

> This covers a very important and grievous abuse in the administration of the pension law. On the objection being made to the necessary legislation being attached to the

> appropriation bill last Saturday I introduced a bill, which was referred to the Committee on Pensions, covering simply the difficulty so far as the administration of the pension law is concerned. The Committee on the Judiciary has very properly taken jurisdiction of the subject in its wider sense and reported this bill, which will cover all cases of like abuse.

The bill did not pass the House in the Forty-seventh Congress. In the Forty-eighth Congress the scope of the bill was broadened by amendment, adding the words "or any officer thereof." (Cong. Rec., v. 15, pt. 3, p. 2627, 48th Cong., 1st session.) As first introduced, the bill was entitled "An act providing for the punishment of persons falsely personating officers and employes of the United States." (Cong. Rec., v. 15, pt. 2, p. 1144, 48th Cong., 1st session.) As if to remove any doubt on the present point, the title was amended so as to read on final passage, "A bill making it a felony for a person to falsely and fraudulently assume or pretend to be an officer or employe acting under authority of the United States, or any Department or any officer thereof, and prescribing a penalty therefor" (Cong. Rec., v. 15, pt. 3, p. 2627, 48th Cong., 1st session), the word "personate" thus being abandoned.

The difference between false personation and false pretenses is recognized in several sections of the Criminal Code. Where it is desired only to punish falsely pretending to be a particular person *in esse*, the word "personate" is used. Thus, in section 33,

immediately after the section in question, Congress provided:

> Whoever shall falsely personate any true and lawful holder of any share or sum in the public stocks, etc.

In section 66, broad language similar to that in section 32 is used:

> Whoever shall falsely represent himself to be a revenue officer, and, in such assumed character, demand or receive any money, etc.

Section 76, on the other hand, again uses the more restricted word "personate":

> Whoever, when applying to be admitted a citizen, or when appearing as a witness for any such person, shall knowingly personate any person other than himself, or shall falsely appear in the name of a deceased person, or in an assumed or fictitious name, etc.

II.

The statute is violated though no fraud be accomplished or no injury from fraud be sustained.

In the opinion sustaining the demurrer the court said (R. 8, 9):

> Before finally disposing of the case, reference may be made to the charge of fraud in the even-numbered counts. These counts were drawn having in view the case of *United States* v. *Rush*, 196 Fed. 579. I entirely agree with the conclusion of Judge Rudkin in that case and am of the opinion that the pleader has not

> met by the additional averments the objection to the allegations there under consideration. There is no allegation in the indictment to sustain a charge that the person alleged to be defrauded was deprived of any right, interest, or property, or that he was cheated or overreached. The mere fact that the purchasers would not have given the defendant their money on account of the books unless they had supposed it was to be paid over to the government on account of the subscription price of the books to be furnished, or that it was falsely stated that the entire price represented the cost of binding the books, is not sufficient to sustain an allegation of fraud. At most it was a mere false representation which did not amount to fraud.

The gist of the opinion in *United States* v. *Rush*, 196 Fed. 579, is embodied in the statement in the opinion therein (p. 581):

> "The charge of committing the offense of obtaining money or property under false pretenses can not be maintained in any case unless it appears not only that a false pretense was in fact made, but also that it was made with the intention of cheating or defrauding some person, and that *such person was in fact cheated or defrauded to his or her injury.*"

1. The intent to defraud being present, a failure to consummate the fraud is no defense.

The construction of the statute for which the Government contends is that it is violated if the acts are done which the statute enumerates, and that

nothing more is required. The statute requires only an intent to defraud, not an actual defrauding. *A fortiori*, no injury need result from the fraud other than that involved in the parting with money, if indeed the obtaining of money by means of false pretenses is the particular violation of the statute charged.

That part of the statute upon which the even-numbered counts were based is as follows:

> Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States * * * and * * * shall in such pretended character demand or obtain from any person or from the United States * * * any money, etc. (Sec. 32, Criminal Code.)

There is nothing here which requires the defrauding actually to be accomplished. A case is made out if the defendant *demands* or obtains money *with intent to defraud*. Thus, the person from whom the money is demanded need not even be deceived. If a trap were laid, and the defendant falsely pretending to be a United States employee demanded money from a detective who well knew the falsity of the defendant's pretenses, the defendant would nevertheless be guilty of a violation of the statute. Under the similar common statute prohibiting false pretenses, it is held sufficient that the indictment alleges an intent to defraud, and the obtaining of money by means of false pretenses without more.

Pearce v. *State*, 115 Ala. 115; *State* v. *Thatcher*, 35 N. J. L. 445; *Reg.* v. *Bloomfield*, Car. & M. 537; *State* v. *Lewis*, 41 La. Ann. 590; Wharton on Criminal Law, 11th ed., vol. II, p. 1641, sec. 1467. In *Commonwealth* v. *Wilgus*, 4 Pick. 177, 178, on an indictment for false pretenses, the court said:

> * * * It was not necessary to prove that Hammond was actually defrauded; if he might have been, and if there was an intent to defraud him, it is sufficient.

It has been held that a trap is no defense to a prosecution for false pretenses. *Rex* v. *Ady*, 7 Car. & P. 140. Similarly, in the common-law crime of forgery, although intention to defraud is essential, no one need be actually defrauded to complete the offense. *Hess* v. *State*, 5 Ohio, 1, 12; 22 Am. Dec. 767; *State* v. *Washington*, 1 Bay, 120, 1 Am. Dec. 601; *Comm.* v. *Ladd*, 15 Mass. 526. In *United States* v. *Lawrence*, 13 Blatchf. 211, on demurrer to an indictment under section 5418 R. S. (originally act of Apr. 5, 1866), which prohibited the forging of bids, affidavits, or other writings "for the purpose of defrauding the United States," it was held that to complete the offense

> it is not necessary that the United States should have been actually defrauded. The act of forgery, done with the intent to defraud the United States, is the act punishable by the statute (p. 214).

2. To sustain a charge of fraud it is not necessary to show any injury in a pecuniary or property sense sustained by the person defrauded.

Hitherto it has been unnecessary for the purposes of this argument to consider the elements constituting fraud. Whether intent to defraud, as many authorities hold, means simply a general guilty intent (*Horman* v. *United States*, 116 Fed. 350, 352), or, as others hold, the terms imply an intent to deprive of some right or benefit, may be immaterial where the statute is satisfied by the mere intent to defraud. But it may be contended that if the acts charged by means of which the fraud was to be accomplished could by no possibility defraud, an intent to defraud, although expressly averred, must necessarily be lacking. Conceding so much, *arguendo*, could or could not the third parties named in this indictment have been defrauded by the acts charged?

In what respect must the person be defrauded? The statute contains no qualification. If more than mere deceit, that is, the loss of a right or benefit must be contemplated in order to make out an intent to defraud, still it is not necessary that the loss be a pecuniary or property one. The right of fair dealing and the right not to part with money are valuable rights. If damages were sought in a civil suit, the defense might properly be made that the loss must be measurable in money in order to permit recovery of money damages. But in this statute, Congress, in exercise of its power to protect the Government serv-

ice, makes it a crime falsely to assume or pretend to have governmental authority, and correspondingly eatablishes a right in every person not to be deprived of his money on the faith of such false pretenses. The false pretense of governmental authority is a material representation of fact. If by reason thereof money be obtained, it is no defense under the statute that books equal in pecuniary value to the money were subsequently shipped to the defendant, or even that the very ten dollars was subsequently returned. The statute is its own measure of wrong-doing.

That the statute does not require any financial or property injury to result from the false representations of defendant seems clear from its wording. It is sufficient if the defendant simply *demands* money. No money need be obtained. Furthermore, under the first half of section 32, whoever, with intent to defraud, falsely pretends to be a United States employee and takes upon himself to act as such, violates the act, and it is not necessary even that money be demanded. The "intent to defraud" can have no different meaning when used in connection with the first half of the section, *i. e.*, where the false pretender takes upon himself to act as the employee he pretends himself to be, than it has in reference to the second half of the section, *i. e.*, where he demands or obtains money from any person.

Furthermore, the intent to defraud required in section 32 is "intent to defraud either the United States or any person,"—the Government or the indi-

vidual. As said with reference to the former, in *United States* v. *Plyler*, 222 U. S. 15, 17:

> * * * It now must be regarded as established that "it is not essential to charge or prove an actual financial or property loss to make a case under the statute."

The indictment in the *Plyler* case was for forging vouchers required upon civil service examination by an applicant, in violation of section 5418 R. S. (now sec. 28 of the Criminal Code), which prohibits the false making of affidavits and other writings "for the purpose of defrauding the United States."

In *Haas* v. *Henkel*, 216 U. S. 462, 480, on an indictment for violation of sec. 5440, R. S., for a conspiracy "to defraud" the United States by securing cotton-crop reports from the Department of Agriculture contrary to the departmental regulations, it was held (pp. 479, 480):

> * * * But it is not essential that such a conspiracy shall contemplate a financial loss or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of the Government. Assuming, as we have, for it has not been challenged, that this statistical side of the Department of Agriculture is the exercise of a function within the purview of the Constitution, it must follow that any conspiracy which is calculated to obstruct or impair its efficiency and destroy the value of its operations and reports as fair,

impartial and reasonably accurate, would be to defraud the United States by depriving it of its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulation. That it is not essential to charge or prove an actual financial or property loss to make a case under the statute has been more than once ruled. *Hyde* v. *Shine*, 199 U. S. 62, 81; *United States* v. *Keitel*, 211 U. S. 370, 394; *Curley* v. *United States*, 130 Fed. 1; *McGregor* v. *United States*, 134 Fed. 195.

See also *United States* v. *Stone*, 135 Fed. 392, and *United States* v. *Moore*, 173 Fed. 122.

These cases are conclusive. If the words of the statute, "intent to defraud * * * the United States," used in connection with defrauding, do not require financial or property loss to the United States to result from the intent to defraud, the meaning of the same words, "intent to defraud," can not be different when used in connection with the very next words in the section, "intent to defraud * * * any person."

Under that section of the statutes prohibiting the use of the mails in furtherance of a scheme or artifice to defraud, the word "defraud" has been given similar definition. In *Wilson* v. *United States*, 190 Fed. 427, defendants were indicted under section 5480, R. S., for selling stock by means of false representations. In holding invalid the defense that it

was not proved that the stock was not worth what the prosecutors had paid for it, the court said (p. 433):

> It is not necessary to determine in this case whether actual injury is an essential element of a civil action for fraud. * * *
>
> But whatever may be the rule in civil cases, we are satisfied that damage is not made an essential element of the federal statutory offense of using the mails to execute a scheme or artifice to defraud. We are of the opinion that a scheme or artifice is established by proof of false and fraudulent misrepresentations by which a person's right to open and fair dealing is invaded; that having shown that the defendants used false and fraudulent means to induce persons to part with their property and to purchase stock which was not of the value represented, the Government was not required to go further and prove either the existence or extent of damage to the purchasers.

In accord are *United States* v. *Bernard*, 84 Fed. 634; *United States* v. *Palmieri*, 169 Fed. 490; *Horman* v. *United States*, 116 Fed. 350; *Harris* v. *Rosenberger*, 145 Fed. 449, 13 L. R. A. (n. s.) 762, 768.

The weight of authority in cases of false pretenses, both in numbers and in principle, is opposed to the doctrine of the *Rush* case. These cases hold that the offense is complete when money or any other valuable thing is obtained by means of false pretenses with intent to defraud, and it is immaterial that other property of equal value be given to the victim at the same time or at any subsequent time.

In *State* v. *Mills*, 17 Me. 211, the indictment charged that the defendant, intending to defraud, falsely pretended that a certain horse which he had for sale was named Charley, and by means of this false pretense one Loring gave the defendant a colt and $5 for the horse. The evidence showed that the horse was in value equal to Charley, but the court held that the State did not have to prove that the horse was unsound or of less value than Charley, and said (p. 218):

> * * * The defendant produced a horse, which he affirmed was Charley. It was a false pretence, fraudulently made, for the purpose of procuring a colt and money from another. The attempt succeeded. * * * It is a case literally within the statute; and we do not perceive why it is not within the mischief it was intended to punish.

In *Comm.* v. *Coe*, 115 Mass. 481, a conviction for obtaining money under false pretenses was sustained where it appeared that the defendant represented that a certificate of stock ownership which he had was good, and thereby with intent to cheat and defraud he obtained a loan. The court held (p. 502):

> * * * Neither the promise to repay, nor the intention to do so, will deprive the false and fraudulent act in obtaining it of its criminality. The offence is complete when the property or money has been obtained by such means; and would not be purged by subsequent restoration or repayment.

In *Clark* v. *People*, 2 Lansing, 329, which held that an indictment for obtaining money or other valuable thing under false pretenses was sufficient where the indictment alleged that the defendant gave a note for certain oxen but did not allege that the note had not been paid, the court said that a subsequent payment would not wipe out the crime committed of obtaining the oxen by false pretenses with intent to defraud. In accord is *People* v. *Sully*, 1 Shel. 17.

In *Comm.* v. *Ferguson*, 135 Ky. 32, 121 S. W. 967, the indictment alleged that defendant falsely represented himself to be of age and induced L. & F. thereby to pay him $2,400 for certain land. The indictment was held good on demurrer notwithstanding the admission that L. & F. suffered no damage and subsequently obtained good title. The court said (135 Ky. 34, 35:)

> * * * It is not necessary that an indictment for false pretense shall charge that the person to whom the false pretense was made sustained any loss. Section 1208 of the Kentucky Statutes (Russell's St. sec. 3474), describing the crime of obtaining money or property by false pretenses, reads as follows: "If any person by any false pretense, statement or token, with intention to commit a fraud, obtain from another money, property, or other thing which may be the subject of larceny, or if he obtain by any false pretense, statement or token, with like intention, the signature of another to a writing, the false making whereof would be forgery,

> he shall be confined in the penitentiary not less than one nor more than five years." Under this statute it is the obtention by fraudulent pretenses of money or property that may be the subject of larceny that constitutes the offense. When the owner is induced to and does part with his property by reason of the false and fraudulent statement or pretense, the offense in this particular is completed. *It is wholly immaterial whether he actually or ultimately suffers a loss or not.* If he should regain his property, or the person obtaining it or another should fully compensate him, it would not lessen the offense, or prevent the Commonwealth from prosecuting and convicting the offender.

In *Donohoe* v. *State*, 59 Ark. 375, 27 S. W. 226, the court said:

> That L. & Co. regained possession of the lumber did not relieve defendant of the consequences of the crime, for that was complete when he obtained possession of the goods by means of false pretenses.

In accord are *People* v. *Bryant*, 119 Cal. 595, 51 Pac. 960; *Ter.* v. *Ely*, 6 Dakota 128, 50 N. W. 623; *State* v. *Cooper*, —— Iowa ——, 151 N. W. 835; *People* v. *Oscar*, 105 Mich. 704; *State* v. *Cooper*, 85 Mo. 256; *West* v. *State*, 68 Nebr. 257, 88 N. W. 503; *State* v. *Thatcher*, 35 N. J. L. 445; *People* v. *Cook*, 41 Hun (N. Y.) 67; *People* v. *Baker*, 122 N. Y. Supp. 516.

In *State* v. *Pryor*, 30 Ind. 350, a conviction was sustained under a statute which provided that—

> If any person, with intent to defraud another, shall designedly * * * by false pretenses obtain the signature of any person to any written instrument, etc.,

for obtaining the signature to a note. The court held that it was not necessary to constitute the offense that actual loss or injury be sustained by the person whose signature was obtained. In accord are *State* v. *Jamison*, 74 Iowa, 613; *People* v. *Genung*, 11 Wend. 18, 25 Am. Dec. 594; and *State* v. *Hanscom*, 28 Ore. 427.

It seems clear that section 32 of the Criminal Code, properly construed, does not require more of an injury to result from the acts charged if the intent be realized, than is involved in the obtaining of the money by means of the false pretenses. In construing the statute to require more than this, and more even than an intent to defraud, the District Court was in error.

CONCLUSION.

The judgment of the court below should be reversed.

JOHN W. DAVIS,
Solicitor General.

ROBERT SZOLD,
Attorney.

AUGUST, 1915.

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AUTHORITIES CITED.

Supreme Court of the United States

OCTOBER TERM, 1915.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
M. J. BARNOW, DEFENDANT IN ERROR. } No. 454.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE DEFENDANT, M. J. BARNOW

STATEMENT OF THE CASE.

The case is brought here by the United States under the Criminals Appeal Act (34 Statutes, 1246), to reverse a judgment of the District Court, Eastern District of Pennsylvania, sustaining a demurrer to an indictment; the opinion of that court is reported in 221 Fed., 120.

The indictment was for alleged violations of Section 32 of the Criminal Code of the United States, which provides:

> "Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government

thereof, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the Government thereof, any money, paper, document, or other valuable thing, shall be fined not more than one thousand dollars, or imprisoned not more than three years, or both."

NATURE OF THE INDICTMENT.

Section 32 deals with two classes of offenses:

1. With intent to defraud, falsely pretending to be an employee "acting under the authority of the United States, *and* taking upon oneself to act as such."

2. With intent to defraud, "demanding or obtaining in such pretended character, anything of value."

The indictment contains six counts, which fall naturally into three pairs; each pair based on a separate transaction with distinct persons, namely, Ennis, Fessler and Wertz; each pair conceives the two crimes defined supra, as committed in separate transactions with each of the three individuals.

The first and second counts undertook respectively to charge the two offenses as committed in the Ennis transaction, the third and fourth counts as committed in the Fessler, the fifth and sixth as in the Wertz.

THE DEMURRER.

The demurrer (R., 6) was to the indictment generally, as well as to each separate count specifically, upon the grounds:

1. Because the same is bad in substance.
2. Because the same fails to set forth facts suffi-

cient to constitute an offense against the United States.

It was agreed below (R., 7) and is admitted at bar (Plaintiff's Brief, 3) *"that there was not in existence any employee or employment such as it was alleged defendant pretended."*

DEFENDANT'S CONTENTION.

The contention of the Defendant is that the section was designed to punish only the false impersonation of existing officers or employees of the United States; the precise question has not before been made in a prosecution under section 32, and an analysis of that section will therefore be undertaken before opening the authorities.

ARGUMENT.

If it be remembered that the crime of "False Personation" is utterly distinct from that of "Obtaining property by False Pretenses," the construction proper for section 32 readily appears.

1. The Act of Codification (35 Statutes, 1088) enacts the "title, chapters, headnotes and sections" of the code into affirmative law; Chapter 4 of the Code is entitled "Offenses against the *operations* of the *Government*."

To undertake to discharge the functions of an actual employee of the United States can concern the operations of the Government, because it may result in so affecting the status or the ability of one with whom the Government has relations as to render him less able, less ready, or less willing to execute or to discharge some affair in which the Government is involved; but the false pretense to a non-existent employment can affect only the rights of the individual person to whom the falsehood is offered; he neither has, nor can he have rela-

tions with the Government on a non-existent subject; such is a subject upon which the Government has, and can have no relations with any person; therefore, the operations of the Government can not be directly or indirectly affected; the only rights possible to be affected are those of the citizen; the statute under consideration is not for the mere protection of the citizens of the several States, for with that the Federal Government is not concerned; such belongs amongst the sovereign functions of the States themselves.

In the headnotes to the chapter, section 32 is identified as, and the section itself in the body of the chapter is headed, "falsely pretending to be United States officer;" the chapter, title, headnote, as well as the section heading thus establishing that the legislation was directed against those who falsely impersonate existing officers or employees; persons actually concerned in the operations of the Government.

PHRASEOLOGY OF THE SECTION.

The section itself writes down as essential to guilt certain elements which are incapable of existence or of specification, unless the employment which was falsely pretended *did* actually exist in the Government's affairs.

As has been observed supra, the section defines two distinct crimes; the first, thus:

> "Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee *acting* under the authority of the United States, or any department, or * * *"

Its elements are:

1. With intent to defraud.

2. Shall falsely assume or pretend to be an officer or employee *acting* under the authority of the United States.

3. And shall take upon himself to *act as such.*

The Government contends that the careful phraseology chosen for the second of the three elements is synonymous with and means no more than, "shall falsely pretend to be *employed* by the United States;" so that guilt would follow although no such employment by the United States in fact existed. What, if any, meaning the Government conceives for the third element, "takes upon himself to act as such," that concept remains enwombed in the profundity of silence; that guarded secret the Government jealously withholds.

As to the statute, the word "Officer" immediately precedes the word "Employee;" and while one could falsely *say* he was a certain "officer" of the United States although no such office in fact existed, yet one could not "assume or pretend to be" an officer "acting under the authority of the United States," unless the office to which he pretended, did in fact exist.

The statute does not say "whoever assumes or pretends to be employed by the United States;" it provides "whoever shall falsely assume or pretend to be *an* officer or employee *acting* under the authority of the United States;" thus manifesting a legislative purpose to penalize not a mere false pretense as to one's personal employment, but the falsely pretending to be one of those persons who are actually and in fact employed by the United States, *if* that pretense is coupled with other specified elements.

The word "assume" is itself significant; its synonym "usurp;" how can any one "usurp" a function, station,

or character which has nowhere any actuality? One might indeed falsely state, or represent that offices or employments in fact existed when they did not exist; but how in the nature of things, could one "*assume* or pretend *to be*" a non-existent character? The contention of the Government would altogether eliminate the third element which the statute writes down as essential to guilt; that is, the "taking upon himself to act as such."

Moreover, the third essential of the first offense defined by the section, "and shall take upon himself to act as such," is not capable of perpetration, unless the pretender assumes functions which actually and in fact belong to another, either officer or employee.

How can one "undertake to act as such" if there be no "such" whose actions may be assumed? How can one "take upon himself to act" in a capacity which is not? If one announced himself to be the Sultan of the United States, what could he do in order to "act as such?" What project, what function could he undertake which would amount to "taking upon himself to act as the Sultan of the United States?"

Again, the crime secondly defined by section 32 in the use of the phrase "or shall in such pretended character demand or obtain" anything of value, in itself alone establishes that the legislative mind contemplated an existing character of "officer" or "employee" to which others might pretend, and which others might assume.

No functions of either office or of employment can belong anywhere unless the office exists in the one case, or the employment exists in the other; nor can one "act as such," unless there exists a model for him to simulate.

The brief of the Government flies utterly wide of all distinctions; it knows none; it apprehends none between falsely impersonating an "officer," an "employment," and a "person;" can there be personation of

an "officer" unless the office exists? Personation of an "employee" unless the "employment" exists? Personation of an "individual" unless the "individual" exists?

The defendant has not claimed, because it is not necessary here to claim, that there must, in order for guilt under the statute, be a pretense to the identity of a certain *individual* employed by the Government; if that question ever arises, it will receive consideration; the defendant now at bar claims only that the *employment* falsely pretended to must have in fact existed; that there must have been in the employ of the United States an "employee" or "employees" to sell the particular publication named in the indictment. The defendant is quite ready to concede that if the law of the land provided for Federal employees to sell the publication (for only by law could such an employment exist) then whoever falsely pretended to be of those employed by the Government for that purpose would to that extent offend the statute, although in no manner did he specify which individual person of those employees he claimed to be.

AUTHORITIES ON GOVERNMENT'S BRIEF.

In formulating its judgment, the court below had before it every judicial expression extant concerning section 32; that judgment is supported by all which are directed toward the subject; those decisions referred to on page 10 of the Government's brief were cited below *in support* of the demurrer.

On page 10 of that brief appears "in previous cases under the statute, the Act is broadly construed *contrary to the decision below.*" Whether the sentiment appropriate for this statement is "indulgence at its artlessness," or "amazement at its effrontery," is amongst

other things submitted; for there exist no decisions "contrary" to that of the court below.

In U. S. v. Curtain, 43 Fed., 433, the assumption was of a postoffice inspector, an office or employment in fact existing, and provided by the statutes of the United States.

In U. S. v. Ballard, 118 Fed., 757, the character assumed was that of United States Deputy Marshal.

In Littell v. U. S., 169 Fed., 620, the character assumed was that of a United States Secret Service Agent.

In U. S. v. Brown, 119 Fed., 482, the characters assumed were of Revenue Officers.

Postoffice inspectors, deputy marshals, secret service agents, revenue officers, are all officers or employees actually existing and directly created by the Federal Statutes.

CASES WHICH SUPPORT THE DECISION BELOW

That the act creates two distinct offenses is established by

U. S. v. Curtain, 43 Fed., 433.
U. S. v. Taylor, 108 Fed., 621.
U. S. v. Farnham, 127 Fed., 478.
U. S. v. Rush, 196 Fed., 579.

In U. S. v. Curtain, 43 Fed., 433, Simonton, J. (charging a jury), said:

> "The act of Congress, under which he is indicted, creates two offenses. The one is where, with intent to defraud the United States, or any person, any one falsely pretends to be an officer or employee, acting under the authority of the

United States, and takes upon himself to act as such. The other is where one falsely assuming such pretended character, shall demand or obtain from any person, or from the United States, or any department or officer thereof, any money, paper, document or other valuable thing. The defendant is indicted under the last subdivision of the act. In order to convict him you must answer these questions in the affirmative: (1) Did this defendant assume or pretend to be a postoffice inspector, acting under the authority of the department? (2) Was such assumption or pretense false? (3) Did he make this false pretense or assumption with intent to defraud Crane, the postmaster? (4) Did he carry out his intent, and did he in this, his assumed or pretended, character, or because of his false assumption or pretense, defraud, or attempt to defraud, Crane?"

"The gist of the offense is not the demanding or obtaining of money, or other thing of value * * * if it were, there might be doubt whether the act * * * could be made an offense against the United States, but the gist of the offense is the false impersonation of an officer of the United States. The false personation of another was made punishable at common law, and Congress undoubtedly has the power to punish the false personation of an officer of the United States."

Littell v. U. S., 169 Fed., 621.

"Section 32 defines two offenses; falsely impersonating an officer or employee of the United

States and acting as such with intent to defraud either the United States or some person; and

"2. Falsely impersonating an officer or employee of the United States and in the pretended and assumed character, demanding or obtaining either from the United States or from some person, any money or valuable thing, with intent to defraud."

U. S. v. Rush, 196 Fed., 579.

In construing the part of section 32 "shall take upon himself to act as such," the court in U. S. v. Farnham, 127 Fed., 478, said:

> "That is, to do such an act as would fall within the province of the officer whose character he assumes."

THE CONSTRUCTION SOUGHT BY THE GOVERNMENT WOULD INVALIDATE THE STATUTE.

The careful choice of phraseology manifested by the terms of section 32 quite certainly indicates that the statute was drafted with an accurate comprehension of the powers of Congress respecting legislation over crimes; an understanding that Congress possesses no power in that field save concerning crimes against the *United States;* not against the individual States, and not against persons; the phraseology manifests not only a comprehension of Federal power, but a determination as well, to remain within it.

The expressions of the court here, concerning the limitations which surround that power of Congress not only support, but require for section 32 that interpretation which was accorded by the court below.

"But an act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. But an act not having any such relation is one in respect to which the State can alone legislate."

U. S. v. Fox, 95 U. S., 670-673.

"Section 5519 of the Revised Statutes, making it a criminal offense for two or more persons in a State or Territory to conspire to deprive any person of the equal protection of the laws of the State, is unconstitutional.

"Those provisions of the law which are broader than is warranted by the article of the Constitution by which they are supposed to be authorized, can not be sustained."

U. S. v. Harris, 106 U. S., 629.

The Government contends (brief, p. 6):

"The gravamen of the offense is * * * the wrongful pretense of Federal authority."

Why, then, was the third and additional element written down in the act as essential to guilt? Why did not Congress make an end with saying "shall falsely assume or pretend to be an officer or employee of the United States?" This much would have condemned the "wrongful pretense of Federal authority," had it been that which Congress sought to condemn; but Congress did not rest there; it had not yet expressed its purpose;

that purpose contemplates as essential to guilt other and further action, entirely beyond the mere "pretense of Federal authority;" to wit, "taking upon himself to act as such" officer or employee, in addition to the "assuming or pretending to be an officer or employee, acting, etc."

In United States v. Farnham, 127 Fed., 478, the defendant had represented himself as a secret service operator engaged upon the business of the Government, and exhibited a metal badge bearing the words "Secret Service, U. S." This representation was false, but he made no effort to use the falsehood in order to obtain money, nor did he undertake to act as such an officer. Ten months later he returned representing himself now as a traveling salesman and procured money upon a worthless check. It was held that the section under consideration had not been violated.

A Michigan statute provides in part:

> "If any person shall falsely assume or pretend to be * * * (certain officers) * * * and shall take upon himself to act as such * * *"

A prosecution under this statute was instituted against one Cronin; an information which set out that he "falsely did personate, represent and pretend * * * that he was then and there a member of the police force," was held defective because it failed to state that he "took upon himself to act as" a member of the police force.

People v. Cronin, 80 Mich., 646.

But why continue to open books for the purpose of establishing that an element made essential to guilt by the statute, must be alleged and proven in the courts?

When the time for that necessity arrives both books and courts had as well remain closed.

SECOND ASSIGNMENT OF ERROR.

Thereunder the Government claims "The statute is violated though no fraud be accomplished, or no injury from fraud be sustained." (Brief, 15.) For the purposes of the case here this proposition may be entirely conceded.

The point is not presented at bar, and is not here for decision.

Upon this subject the learned judge said below (R., 8-9):

> "Before finally disposing of the case, reference may be made of the charge of fraud in the even-numbered counts. These counts were drawn having in view the case of United States v. Rush, 196 Fed., 579. I entirely agree with the conclusion of Judge Rudkin in that case and am of the opinion that the pleader has not met by the additional averments the objection to the allegations there under consideration. There is no allegation in the indictment to sustain a charge that the person alleged to be defrauded was deprived of any right, interest, or property, or that he was cheated or overreached. The mere fact that the purchasers would not have given the defendant their money on account of the books unless they had supposed it was to be paid over to the Government on account of the subscription price of the books to be furnished, or that it was falsely stated that the entire price represented only the

> cost of binding the books, is not sufficient to sustain an allegation of fraud. At most it was a mere false representation which did not amount to fraud."

The observations of a Judge in announcing his opinion are not the judgment of the Court in which he presides. There is nothing in the judgment rendered below which even suggests that the Court, in considering the statute as distinguished from the indictment, announced that the actual perpetration of a fraud was essential to guilt.

Nevertheless, if the opinion of the learned judge, as distinguished from the judgment of his court be taken as the court's decision, it becomes at once manifest that in the respect complained of by the Government, his mind was concerned with the construction of the even-numbered counts of the indictment and no wise had in contemplation the construction of the statute. While the Government is contending here that the consummation of a fraud is not essential to guilt, and while nobody seems to dispute it, yet in the even-numbered counts of the indictment, the Government specifically *charged* the defendant with having in fact "obtained" money through the *actual perpetration of a fraud;* those counts proceeded further to the setting down in detail of the facts of the transaction—the project in which the defendant was engaged, the representations which he made, what he received and what he gave in exchange for it; in other words, that he was a book agent, who sold a man a set of books for a certain price and delivered to him exactly what he had intended to buy and exactly what he expected to receive; in this situation no fraud is or can be present; as a practical proposition, no man can intend either expressly or constructively, more than

is contained within either his purpose or in his actual accomplishment; and if what he undertakes on the one hand, or accomplishes on the other, can not in law amount to a fraud, the fact that he may perchance mistakenly, think it to be fraud, can not make it such; and by intending to accomplish, what he does in fact accomplish, he can not intend to commit fraud, if his accomplishment is not susceptible of perpetrating fraud; so when a purchaser receives for his money exactly what he intends to buy, he is not defrauded, although the seller wore boots when thought to be wearing shoes, or even did not work for the Government, when it was conceived that he did.

Now the expressions of the learned judge amount to no more than a construction of particular averments in certain counts of the indictment; of particular facts set down in the even-numbered counts of the indictment; upon the point of whether, *while those particular facts were contained in the respective counts*, they (the counts) could as matter of law be held to charge that money actually obtained according to those facts, was obtained through fraud.

It logically follows that if certain acts could not contain fraud, could not accomplish fraud, that the doer of those acts, acts inherently innocent of fraud could not by the doing of them have intended to accomplish that which they can not contain—a fraud; therefore, could not have entertained, could not have been moved by *an intent* which was fraudulent. And therefore, concluded the learned judge, "there is no allegation in the indictment to *sustain a charge* that the person *alleged to be defrauded* was deprived of any right, interest, or property, or that he was cheated or overreached;" in other words, whatever the defendant may have "intended" he could

not have intended to defraud Ennis, without "intending" to deprive him of some "right, interest, or property," or to "cheat or overreach" him; the counts of the indictment being specific in charging the details of the transaction, it became the duty of the judge to construe those averments, and to say whether the intent to accomplish what the defendant in fact accomplished *could* in the law, or in the nature of things, constitute "an intent to defraud."

The lower court in no wise held that fraud must be perpetrated, in order to guilt under the statute; it did no more than construe particular counts of the indictment; counts containing certain averments of fact set down in the counts themselves, and which very facts established the absence, and refuted the presence, of a consummated fraud; and therein established the absence of an "intent to defraud." Such was the construction accorded those particular counts—not a construction put upon the statute.

The second assignment of error, based at best upon the construction of the indictment as distinguished from that of the statute, must therefore fail.

> "The action of the court below as to the mere construction of the indictment is not open to review on the writ of error authorized by the act of March 2, 1907. * * *"
>
> U. S. v. Biggs, 211 U. S., 305.

The judgment below, being correct to the extent that only the assumption or the pretense to an "existing" employment is contemplated by section 32, that judgment required the sustaining of the demurrer to *all* counts of the indictment, because each count must show

an existing employment in order to charge an offense; so that even were the Government correct on its "Second Assignment of Error," the judgment must nevertheless be in all particulars affirmed.

Respectfully submitted,

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UNITED STATES *v.* BARNOW.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 454. Argued October 18, 1915.—Decided November 8, 1915.

The prohibition in § 32, Criminal Code, against falsely assuming or pretending to be an officer of the United States or employé acting under its authority is not confined to false personation of some particular person or class of persons but prohibits any false assumption or pretense of office or employment under the authority of the United States, or any department or officer of the Government, if done with intent to defraud, and accompanied with any of the specified acts done in the pretended character.

The offense under § 32, Criminal Code, is complete on the false personation or pretense and the demanding or obtaining money as the result thereof, even if the person defrauded be not financially injured in consequence thereof.

It is within the power of the United States to prohibit the false personation of its officers or the false assumption of being an officer of the United States, and legislation to that end does not interfere with, or encroach upon, the functions of the States, and so *held* as to § 32, Criminal Code, construed in this case as including a prohibition of the false pretense of holding a non-existent office under non-existent officers of the United States Government.

221 Fed. Rep. 140, reversed.

THE facts which involve the construction of § 32 of the Criminal Code and the validity of an indictment thereunder and the extent of the jurisdiction of this court under the Criminal Appeals Act, are stated in the opinion.

Mr. Solicitor General Davis, with whom *Mr. Robert Szold* was on the brief, for the United States.

Mr. Daniel Thew Wright, with whom *Mr. T. Morris Wampler* and *Mr. Henry D. Green* were on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This case is brought here under the Criminal Appeals Act (c. 2564, 34 Stat. 1246), to review a judgment of the District Court (221 Fed. Rep. 140), sustaining a demurrer to an indictment founded upon § 32 of the Criminal Code of March 4, 1909 (c. 321, 35 Stat. 1088, 1095). By that section these offenses are prohibited:

(1) With intent to defraud either the United States or any person, the falsely assuming or pretending to be an officer or employé acting under the authority of the United States, or any department, or any officer of the Government thereof, and taking upon oneself to act as such.

(2) With intent to defraud either the United States or any person, the falsely assuming or pretending to be an officer or employé, etc., and in such pretended character demanding or obtaining from any person or from the United States, or any department, or any officer of the Government thereof, any money, paper, document, or other valuable thing.

The indictment contains six counts, of which the first, third, and fifth are based upon the former, and the second, fourth, and sixth upon the latter of these prohibitions. The first count charges that defendant, with intent to defraud a certain person named, did falsely pretend to be an employé of the United States acting under the authority of the United States, to wit, an agent employed by the Government to sell a certain set of books entitled "Messages and Papers of Presidents," and did then and there take upon himself to act as such agent, in that he visited the person named and falsely pretended to him that he was such an employé of the United States, employed as aforesaid for the purpose aforesaid. The third and fifth counts differ only as to the names of the persons mentioned and the dates of the alleged offenses.

The second count charges that defendant, with intent to defraud a certain person named, did falsely pretend to be an employé of the United States acting under the authority of the United States, to wit, an agent employed by the Government to sell a certain set of books entitled "Messages and Papers of Presidents," and in such pretended character did obtain from the person named the sum of ten dollars, which he would not have given to defendant unless he had supposed him to be an employé of the Government, and had supposed that the money was to be paid over to the Government on account of the subscription price of the books, etc. The fourth and sixth counts are in like form.

It was and is admitted that there was not in existence such an employé or such an employment as it was alleged the defendant pretended.

The District Court held that the gist of the offense is the false personation of an officer or employé of the United States, and in order to constitute such an offense there must be personation of some particular person or class of persons, since there cannot be a false personation of a supposititious individual who never existed or whose class never existed. Upon this construction of the statute, all of the counts fell.

We think this is to read the act in too narrow a sense. Not doubting that a false personation of a particular officer or employé of the Government, or a false pretense of holding an office or employment that actually exists in the Government of the United States, is within the denunciation of § 32, we think it has a broader reach. No convincing reason is suggested for construing it more narrowly than the plain import of its language. To "falsely assume or pretend to be an officer or employé acting under the authority of the United States, or any Department, or any officer of the Government thereof," is the thing prohibited. One who falsely assumes or pre-

tends to hold an office that has a *de jure* existence is admittedly within its meaning. That is, where the assumption or pretense is false in part but contains a modicum of truth, the statute is violated. Why should it be deemed less an offense where the assumption or pretense is entirely false, as where the very office or employment to which the accused pretends title has no legal or actual existence? It is insisted that the words next following—"shall take upon himself to act as such, or shall in such pretended character demand or obtain," etc.—indicate an intent to punish only false personation of existing officers or employés, and not a false representation as to some supposititious employment by the Government. But to "take upon himself to act as such" means no more than to assume to act in the pretended character. It requires something beyond the false pretense with intent to defraud; there must be some act in keeping with the pretense (see *People* v. *Cronin*, 80 Michigan, 646); but it would strain the meaning of the section to hold that the offender must act as a veritable officer of the Government would act. And so, in the second branch of the section, the demanding or obtaining of the thing of value must be done "in such pretended character"—words that are far from importing that the office or employment must be one that is duly established by law.

It is said that to give to the statute the broader meaning extends it beyond the limitations that surround the power of Congress, and encroaches upon the functions of the several States to protect their own citizens and residents from fraud. We are referred to *United States* v. *Fox*, 95 U. S. 670, 672, where it was declared by Mr. Justice Field, speaking for the court: "An act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States, unless it have some relation to the execution of a power of Congress, or to some matter

within the jurisdiction of the United States. An act not having any such relation is one in respect to which the State can alone legislate." Accepting this criterion, the legislation now under consideration is well within the authority of Congress. In order that the vast and complicated operations of the Government of the United States shall be carried on successfully and with a minimum of friction and obstruction, it is important—or, at least, Congress reasonably might so consider it—not only that the authority of the governmental officers and employés be respected in particular cases, but that a spirit of respect and good-will for the Government and its officers shall generally prevail. And what could more directly impair this spirit than to permit unauthorized and unscrupulous persons to go about the country falsely assuming, for fraudulent purposes, to be entitled to the respect and credit due to an officer of the Government? It is the false pretense of Federal authority that is the mischief to be cured; of course, only when accompanied with fraudulent intent, but such a pretense would rarely be made for benevolent purposes. Now, the mischief is much the same, and the power of Congress to prevent it is quite the same, whether the pretender names an existing or a non-existing office or officer, or, on the other hand, does not particularize with respect to the office that he assumes to hold. Obviously, if the statute punished the offense only when an existing office was assumed, its penalties could be avoided by the easy device of naming a non-existent office.

Therefore, it seems to us, the statute is to be interpreted according to its plain language as prohibiting any false assumption or pretense of office or employment under the authority of the United States, or any Department or officer of the Government, if done with an intent to defraud, and accompanied with any of the specified acts done in the pretended character, and the District Court

erred in attributing to the Act a more restricted meaning.

We think there was further error in the ruling of the court that the even-numbered counts must fall for the reason, as expressed in the opinion, that there was no allegation to sustain a charge that the person alleged to be defrauded was deprived of any right, interest, or property, or that he was cheated or overreached. In this the court followed *United States* v. *Rush*, 196 Fed. Rep. 579.

Since our review, under the Criminal Appeals Act, is confined to passing upon questions of statutory construction, we are not here concerned with the interpretation placed by the court upon the indictment. *United States* v. *Patten*, 226 U. S. 525, 535, and cases cited. We must, for present purposes, accept that interpretation, hence we express no opinion as to whether the District Court erred in holding that the even-numbered counts did not allege a consummated fraud. The question with which we have to deal is whether the second branch of § 32 of the Criminal Code, upon which the even-numbered counts are founded, requires that the fraud shall be consummated, with consequent injury to the party defrauded, in order that the offense shall be complete.

It has been held that in an indictment under § 5440, Rev. Stat., for a conspiracy to defraud the United States, it is not essential that the conspiracy shall contemplate a financial loss, or that one shall result; and that the statute is broad enough to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any Department of the Government. *Haas* v. *Henkel*, 216 U. S. 462, 479. And with respect to § 5418, Rev. Stat., prohibiting the forging of any public record "for the purpose of defrauding the United States," a similar decision was reached. *United States* v. *Plyler*, 222 U. S. 15.

Like reasoning, we think, must be applied to § 32 of

the Criminal Code, whether the United States, or "any person," be the intended victim. If, with intent to defraud, and by falsely assuming or pretending to be an officer or employé acting under the authority of the United States, the accused shall, in the pretended character, have demanded or obtained any money, paper, document, or other valuable thing, the offense is complete, notwithstanding some valuable consideration was offered or given by the pretended employé for that which he demanded or obtained. It is the aim of the section not merely to protect innocent persons from actual loss through reliance upon false assumptions of Federal authority, but to maintain the general good repute and dignity of the service itself. It is inconsistent with this object, as well as with the letter of the statute, to make the question whether one who has parted with his property upon the strength of a fraudulent representation of Federal employment, has received an adequate *quid pro quo* in value, determinative. Of course, we do not mean to intimate that it may not in a proper case be taken into consideration as a circumstance evidential upon the question of intent.

The judgment must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.